STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. T-07/09-398
	)	& T-07/09-413
Appeal of	)	

INTRODUCTION

The petitioner, the Visiting Nurse Association & Hospice of Southwestern Vermont Health Care (hereinafter "the VNA") appeals the decision by the Division of Licensing and Protection of the Department of Disabilities, Aging, and Independent Living (hereinafter "DAIL") finding a "deficiency" resulting from the VNA's failure to provide in-home services to an elderly and disabled adult. The issue is whether the VNA is in violation of DAIL's Regulations for the Designation and Operation of Home Health Agencies (hereinafter "the regulations").

On January 12, 2010, at the last of the several telephone status conferences that were held in this matter, DAIL represented that it was unwilling or unable to furnish the Board and the VNA with a proffer of evidence specifically disputing any of the facts alleged by the VNA in its prior written submissions to DAIL and the Board. To date, DAIL has failed to specifically identify any objection to or dispute with any of the facts contained in the following discussion,

which are based primarily on the VNA's prior written submissions.

DISCUSSION

On March 17, 2009 DAIL conducted an on-site investigation of the VNA following reports it had received (including from the VNA itself) that the VNA had failed to provide in-home services under Medicare to an elderly and disabled woman. On March 24, 2009 DAIL sent the VNA a letter citing a violation of Section 5.4 of its regulations, and directing the VNA to file a "plan of correction" by April 3, 2009.

It appears that the parties then entered into an "informal dispute resolution" process, which failed to resolve the matter. On April 28, 2009, DAIL sent the VNA a letter affirming its citation of a deficiency. It further appears that the parties then participated in a commissioner review hearing, which also did not resolve the matter. On June 19, 2009 DAIL sent the VNA a letter again affirming its initial decision.

On June 29, 2009 DAIL sent another letter to the VNA stating that the VNA could be liable for a fine of $500 a day, effective March 24, 2009, for the VNA's failure to file

a plan of correction as directed by the Department on that date. In a letter to the VNA's attorney dated July 15, 2009, the Commissioner declined to reconsider DAIL's position in the matter.

On July 20, 2009, DAIL notified the VNA that the plan of correction it had submitted was not acceptable, and that DAIL was imposing a fine of $5,000 against the VNA in addition to an "administrative penalty" of $500 a day for its failure to file an acceptable plan of correction. The VNA appealed all of DAIL's decisions to the Board.[1]

The regulation in question, Section 5.4, provides as follows:

> Home health agency (sic) has the obligation and responsibility to provide or arrange for all designated services to all eligible patients within their designated geographic area who request its services.
>
> These services will be provided and/or arranged for in accordance with the specific program or services eligibility guidelines.

(Emphasis in original.)

The issue in this case centers on the interpretation of the term "eligible patients" as it appears in the above regulation. The basis of the Department's decisions in this

[1] Two separate appeals that the VNA filed with the Board have been consolidated. DAIL has suspended the imposition of any fines and sanctions against the VNA pending the resolution of this fair hearing.

matter is its position that the above regulation refers to all patients who are *clinically* eligible for Medicare services based on their medical need. The VNA maintains that the term "eligible" must take into consideration whether the services in question can be safely and adequately provided to the patient in her home based on an assessment of the conditions that exist in that patient's home.

In support of its position, the VNA cites a provision in the federal Medicare regulations governing the VNA's ability to bill Medicare for in-home services. The provision in question, 42 C.F.R. § 484.18, which appears in the sections governing "Home Health Services", includes the following:

> **Condition of participation: Acceptance of patients, plan of care, and medical supervision.**
>
> Patients are accepted for treatment on the basis of a reasonable expectation that the patient's medical, nursing, and social needs can be met adequately by the agency in the patient's place of residence. Care follows a written plan of care established and periodically reviewed by a doctor of medicine, osteopathy, or podiatric medicine.
>
> (a) Standard: Plan of care. The plan of care developed in consultation with the agency staff covers . . .any safety measures to protect against injury . . .

As will be discussed in more detail below, there is no indication that DAIL in any way disputes the VNA's position that in its and all the patient's doctors' medical judgments,

the VNA could not safely provide services to the patient in her home due to the refusal by the patient and her husband to obtain services that were necessary for the maintenance of such safety. There is also no dispute that in light of the patient's noncooperation regarding in-home safety, VNA's refusal to provide in-home services to the patient has resulted in the patient being admitted to an institutional care facility "against her wishes".

The VNA also does not dispute that after it declined to provide in-home services to the patient it did not physically "arrange for" for those services to be provided by another service provider. DAIL apparently maintains that these facts alone (VNA's declining to provide services itself and VNA's failure to arrange for an alternative provision of services) require a finding that the VNA is in violation of Section 5.4, *supra*, of its regulations. DAIL further maintains that its regulations dictate a "higher standard" for home health agencies despite any limitations that might arguably be imposed on them by federal Medicare regulations.

As noted above, however, at this point DAIL has in effect conceded that it does not dispute any of the following *additional* facts alleged by the VNA in its written

submissions in this matter. See Fair Hearing Rule No. 1000.4B. Those facts include the following.

1. The patient in question requested home health services through her husband following a visit to the emergency department of her local hospital.

2. The patient's doctors "prescribed" home health services after the patient and her husband refused to consider a nursing home.

3. It was the VNA's professional determination that it was unsafe to provide Medicare services to this patient in her home for the following reasons:

a. The patient was at a high risk of falling.

b. Her husband was physically incapable due to his advanced age and his own health problems to adequately and safely provide physical assistance and supervision for her.

c. Her husband adamantly and repeatedly refused to consider hiring anyone else to assist the patient despite the patient's apparent financial ability to do so.

4. The federal Medicare regulations require that there be adequate safety measures in place in the patient's home before, and as a condition of, the VNA, or any other Medicare provider, providing home health services.

5. The VNA promptly reported to the Protective Services Division of DAIL that it had determined that the patient was unsafe in her home.

6. DAIL also received similar reports regarding the patient's safety in her home, including two from the staff and physicians at the hospital that had provided emergency treatment, and another from area Council on Aging. All of these reports concurred with the VNA's position that the patient's spouse was unable and unwilling to himself provide or take any other measures to ensure the patient's safety in the home.

7. The VNA would have been exposed to substantial regulatory and financial liability if it had undertaken or arranged for services in the patient's home when it was unsafe to do so and the patient and her husband were refusing to allow anyone except the patient's husband provide the additional (i.e., non-Medicare) services that were essential for the patient's safety.

8. Prior to declining to provide services to the patient the VNA had taken the following steps:

a. It had rescheduled three separate intake interviews after the patient's husband had "rebuffed" them.

b. On the fourth try it insisted on conducting the intake interview despite the husband's continuing objection and attempted interference.

c. At the interview it was "obvious" that the patient's husband did not have the strength, stamina, or memory sufficient to provide necessary supportive care and to adequately monitor the patient's medications.

d. At the interview the VNA provided the patient's husband with a "full and complete" list of local private providers, with telephone numbers, for supportive care.

e. The patient and her husband verbally refused to consider obtaining such care.

f. The VNA learned that the only other home health care agency in that area (apparently private) had already been contacted, but had not been hired by the patient.

g. The VNA had reasonably determined that it would not have been reimbursed for any additional services it might have provided to the patient that were not covered by Medicare.

As noted above, none of the patient's doctors or any other caregiver (nor, for that matter, apparently DAIL itself) disagrees with the VNA's professional assessment of the patient's health and safety needs. Under the above

circumstances, it is truly puzzling what DAIL would have the VNA do as a "plan of correction". Certainly, nothing in the plain language of the regulation limits the definition of "eligible patients" to so-called *clinical* eligibility for Medicare. To the contrary, the emphasized portion of the regulation clearly specifies that any services must be provided or arranged for "in accordance with the specific program or service eligibility guidelines". (Emphasis added.)

In this case, the patient was clearly not eligible for in-home services under Medicare because of her self-imposed safety issues. The Board cannot, and certainly need not, read into Section 5.4 a "conflict" with federal provisions requiring that adequate safety measures be in place before patients can receive Medicare coverage for home health services. Moreover, Section 5.4 cannot reasonably be read as requiring home health agencies to either work without compensation (or attempt to arrange for someone else who will) for a family who can afford to pay or knowingly violate federal standards for Medicare reimbursement, either way patently risking regulatory, professional, and legal liability.

It may be unfortunate (although there is no evidence that it was to her medical detriment) that the patient in

this matter had to go to an institutional care facility against her wishes. However, nothing in the Department's decisions and arguments offers the slightest suggestion as to what more the VNA, ethically and legally, could have possibly done under the above circumstances to have avoided this result.

ORDER

DAIL's decision that the VNA was in violation of Section 5.4 of the Home Health Agency Regulations is reversed.

# # #